



Review

Implementation of Istanbul Protocol for effective documentation of torture – review of Sri Lankan perspectives

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ABSTRACT

Documentation of torture is a multidisciplinary, multistage scientific procedure evolved over the past decades through the experience of various strata in medical and related fields. It plays a key role in effective corroboration of facts, providing redress to victims and also has a long term regulatory impact on prevention of torture in a society. The UN endorsed Istanbul protocol serves as the model for effective documentation of torture in the present context and there were many attempts in the recent years to create a systematic and uniform approach among professional bodies to document torture by adopting it to the local medico-legal and legal systems in some less resourced countries.

The post independent Sri Lanka is widely known in international human rights forums for the prevalence of torture and its endemicity since 1970s. The long term struggle to ensure justice to torture victims in Sri Lanka has been greatly enhanced by the submission of detailed medico-legal reports on them to relevant courts. As strengthening of medico-legal and legal reporting strategies were more focused towards the end of twentieth century the medico-legal and legal professionals in consensus attempted to use Istanbul Protocol for documentation of torture since 2004. However Sri Lankan experience on application of Istanbul protocol for documentation of torture signifies that unless and until a political commitment is shown by the government to internalize Istanbul Protocol into legal and medico-legal systems locally the expected outcome of effective documentation would not be evident.

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1. Introduction

The practice of torture by police, armed forces and other government allies has been an endemic phenomenon in most South Asian countries for past many decades and Sri Lanka is not exempted from it. In major international forums held during the last decade where the human rights profile of Sri Lanka was a subject, the issue of torture had received high prominence during the discussions. However Sri Lanka has not yet shown significant positive signs of attempting to combat torture through existing legislative and administrative and policing mechanisms. A recent retrospective study performed on torture methods adopted in Sri Lanka has revealed application of 68 different methods of torture.¹ In another recent study the researchers were able to detect 37 physical and psychological methods practised on torture victims.² A main international corroboration on broad practice of torture in Sri Lanka was provided by Dr. Manfred Novak the UN Special

Rapporteur on Torture in his press release following the visit to Sri Lanka in October 2007.

“Though the government has disagreed, in my opinion the high number of indictments for torture filed by the Attorney General's Office, the number of successful fundamental rights cases decided by the Supreme Court of Sri Lanka, as well as the high number of complaints that the National Human Rights Commission continues to receive on an almost daily basis indicates that torture is widely practised in Sri Lanka. Moreover, I observe that this practice is prone to become routine in the context of counter-terrorism operations, in particular by the TID.”³

Despite its monarchical and colonial residues the most recent chapter on Torture in Sri Lanka begins with the onset of independence from colonialism in mid twentieth century. The term “torture” is first officially included in the 1978 constitution of Sri Lanka and there exists a lag period of thirty years from the year of independence up to 1978. If this lag period is carefully searched it would be evident that this era was full of events amounted to torture though they were not classified under torture and some

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events were unrecorded. Many public protests occurred in this period and the youth uprising in 1971 were brutally controlled by executing torture through government administrative machinery. Therefore the post 1978 events of torture in Sri Lanka which were widely recorded and publicised locally and internationally have its roots in the pre 1978 events which were distant memories to the present generation.

2. Definition of torture

Torture is a crime according to all international standards. According to the United Nations Convention Against Torture (CAT), 1984:

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴

The Istanbul Protocol (IP) also follows the same definition.

3. Medico-legal investigation of torture in Sri Lanka

Sri Lanka made its obligations clear at least to the international community with the ratification of UN Convention Against Torture (CAT) and the subsequent enactment of it through local legislation in 1994. However the real strength of this ratification or the local legislation of CAT was never evident in its full capacity in Sri Lanka. The UN special rapporteur has also commented about the failure of the Sri Lankan Torture Act in his press release in 2007.

"I appreciate that by enacting the 1994 Torture Act, the Government has implemented its obligation to criminalize torture and bring perpetrators to justice. I am also encouraged by the significant number of indictments filed by the Attorney General under this Act. However, I regret that these indictments have led so far only to three convictions. One of the factors influencing this outcome is reportedly because of the Torture Act's high mandatory minimum sentence of seven years; it is effectively a disincentive to apply against perpetrators. Other factors are the absence of effective *ex-officio* investigation mechanisms in accordance with Art 12 CAT, as well as various obstacles detainees face in filing complaints and gaining access to independent medical examinations while still detained."³

The CAT act is now considered as a part of the criminal law in Sri Lanka. Hence it is well apparent that detailed crime scene investigation and victim examination procedures must be followed in all investigations pertaining to allegations of torture. However unlike in other criminal offences one crucial factor stands between the torture victim and the final investigation report in Sri Lanka. That is the investigative mechanism which is obviously the police to which the perpetrator often belongs to. The absence of an independent special investigations unit within the government to inquire about allegations of torture levelled against armed forces, police and other officials has certainly aggravated the circumstances over the years. Therefore the attempts of flawed investigations, delayed investigations, false accusations made against victims and threatening victims and their families have been necessarily a part of the routine investigation procedures into the alleged torture incidents. In such a deteriorating pre trial situation the effective medical

reporting of torture in Sri Lanka was responsible to a greater extent for effective corroboration of facts to establish liabilities of alleged perpetrators in fundamental rights cases during last 25 years. The reported Supreme Court cases in Sri Lanka on Article 11 of the constitution will bear witness for this fact.

The present medico-legal system in Sri Lanka has many of its roots in the British system acquired through the colonial relationship. However the full time specialist forensic practitioners in Sri Lanka, known as consultant Judicial Medical Officers (JMOO) are performing both clinical forensic and forensic pathological work simultaneously unlike in UK and Australia. Thus the routine case-load of a Judicial Medical Officer (JMO) has significant impact on his/her performance. This is more relevant when it comes to examination and documenting findings of a torture victim which is generally a time consuming procedure. In a situation where the increasing number of torture victims need to be examined routinely, the JMOO have to be vigilant regarding the maintenance of the standards of documentation procedure.

4. Istanbul Protocol: contents and its significance

It has been verified by previous international experience that effective documentation is one realistic method of reducing and preventing torture in a given community.⁵ In this background, the Istanbul Protocol provides a strong platform to conduct scientific investigation of torturous practices adopted and record findings for courts to follow in the future proceedings. The requirement for proper medical documentation of torture has been evolved over the years as a part of the core concept of necessity for effective investigation into torturous practices. The main developments related to investigation of torture over the last 50 years were observed in following areas:

- Standard medical examination methods
- International legal standards
- Ethical codes

The Istanbul Protocol⁶ (IP) is the condensed version of all the above. The IP is a consensus document finalised in a meeting in Istanbul in 1999 and subsequently endorsed by the (then) UN High Commissioner for Human Rights. It was set up as a protocol for investigations by a commission of enquiry into past allegations of torture, and the sections on medico-legal assessment are less than half of it. It did also allow an NGO to challenge official reports that did not comply with the IP by providing alternative reports. Although Sri Lanka was represented in the initial meetings of formulating IP it is still not incorporated to official medico-legal practice in Sri Lanka.

Its main contents are:

Introduction

- 1) Relevant International Legal Standards
- 2) Relevant Ethical Codes
- 3) Legal Investigations of Torture
- 4) General Interview Considerations
- 5) Physical Evidence of Torture
- 6) Psychological Evidence of Torture

Appendices

- Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Diagnostics Tests
- Anatomical Drawings for the Documentation of Torture
- Guidelines for Medical Evaluations of Torture and Ill Treatment

Many procedures for a torture investigation are documented in the manual, such as how to interview the alleged victim and other witnesses, selection of the investigator, safety of witnesses, how to collect statements from alleged perpetrators, how to secure and obtain physical evidence, and detailed guidelines on how to establish a special independent commission of inquiry to investigate alleged torture and ill treatment. The manual also includes comprehensive guidelines for clinical examinations to detect physical and psychological evidence of torture and ill treatment.⁷

These guidelines represent a consensus among clinicians working in the fields of human rights documentation and treatment of individuals who have been tortured. The Istanbul Protocol also outlines minimum standards for state adherence to ensure the effective documentation of torture in its “Principles on the Effective Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”. These “Principles” have been submitted to United Nations officials for consideration as a General Assembly Resolution. The guidelines contained in the manual are a set of minimum standards but due to the jurisprudence, it can arguably be considered as having obtained customary law status and therefore enforceable whilst the “Principles” contained in the IP are enforceable to all States that have ratified the UNCAT. Therefore the IP provides a comprehensive checklist to follow in busy forensic settings overwhelmed by clinical and pathological work as evident in Sri Lanka. Although the IP has laid down a detailed documentation format, the implementation of IP will lead to a uniform documentation process which ensures minimum standards of documentation followed by all JMO’s in practice.

The JMOO in Sri Lanka were used to document injuries on torture victims in detail long before the Istanbul Protocol came into practice. However the existing formats to document injuries in clinical scenarios such as Medico-Legal Examination Form (MLEF) and Medico-Legal Report (MLR) were not designed to document the wide range of situations where torture could be practised and hence were not appropriate to record examination findings of torture victims.⁸ Accordingly most full time forensic practitioners have adopted a free style reporting method which provide more space for them to mention the narration of the victim and describe the multiple injuries observed with related opinion. These reports were accepted since its inception by the Supreme courts in fundamental rights applications and they usually follow the order of documentation recommended in the Istanbul Protocol. Therefore with the introduction of IP the defacto free style reporting system adopted for many years in Sri Lanka will receive a more refined and acceptable status. However the official acknowledgement of IP is mandatory in Sri Lanka if we are to proceed with the detailed procedures mentioned in the IP in each individual examination. The main responsibility of getting this job done lies with the College of Forensic Pathologists of Sri Lanka in consultation with the Attorney Generals Department.

The IP demands a teamwork approach in documenting findings of torture victims. It is a difficult issue to meet in less resourced countries like Sri Lanka as most medico-legal units have to depend on specialists in the other hospital units for referral purposes. A number of practical issues, such as the *time* and *resources* available and the *composition of the investigation team and their level of expertise* also affect implementation. The time available for medico-legal documentation basically sets the limits. “At RCT, a client typically undergoes a thorough rehabilitation process lasting up to one year involving a wide range of doctors, psychologist, nurses, physiotherapist and social workers. The time spent on one client equals time away from a new one, and time is thus still an issue at a comparatively well-resourced establishment as the RCT.”⁹ In Sri Lankan clinical forensic medicine settings the torture victims are examined mostly for medical documentation of

findings in view of their court cases and they are not usually followed up by JMOO for rehabilitation or for treatment procedures. Thus the period of time spent on one victim is much shorter than what it is in RCT. The RCT model would serve as a superior design for torture victim examination though it’s a far reachable position according to the prevailing situation in Sri Lanka and other south Asian countries.

As mentioned in the introduction of the Istanbul Protocol “Torture is a profound concern for the world community. Its purpose is to deliberately destroy not only the physical and emotional well-being of individuals but also, in some instances, the dignity and will of entire communities. It concerns all members of the human family because it impugns the very meaning of our existence and our hopes for a brighter future.”⁶ The dual role played by governments as direct or indirect perpetrators and investigators in cases of Torture has made it extremely difficult to control the incidence of torture in the modern society. It was clear during previous years that even the developed countries attempt to maintain a fine balance between practice and investigation of torture as warranted by their political agendas. However a different picture is seen with regard to countries like Sri Lanka due to overwhelming practice of torture and non-availability of an effective mechanism to regulate it.

5. Effects of incomplete medico-legal documentation of torture

The other major issue related to medical documentation of torture in Sri Lanka is the examination of torture victims by non-expert medical officers in peripheral hospitals. These medical officers are often the first contact point for most torture victims in Sri Lanka and they are not trained adequately to perform thorough medico-legal examination and documentation of findings on torture victims. In many instances in the past a huge difference has been observed in relation to examination findings of torture and the opinion expressed by the non-expert medical officers and expert forensic practitioners on the same patient. The police being the accused party in most of the instances and officially the investigative party as well have used this lacuna to submit substandard and falsified medical reports to courts in many occasions bypassing the expert forensic practitioners.

The supreme courts have highlighted this fact in several cases and the following excerpts from a decided case in 1987 will bear ample testimony for it.

“The report of the M.O., Bandaragama, is, in my view, valueless and unworthy of acceptance. On his own showing it is evident that he has not carried out an independent examination of the petitioner to ascertain whether he had any injuries. It seems to me to be preposterous for any medical officer before whom a suspect is produced for a medical examination in the custody of a police officer to expect him to tell the officer in the very presence of that police officer that he bears injuries caused to him as a result of a police assault. This seems particularly so when the suspect is produced at the instance of the police themselves and not upon an order of court. I therefore reject the report of the M.O. as being worthless and unacceptable. The circumstances of this case disclose a gross lack of responsibility and a dereliction of duty on the part of the M.O., Bandaragama. I do not entertain the slightest doubt that the A.J.M.O., Colombo, sets out in his report the true and precise nature of the injuries found by him on the petitioner at the time he examined him.”

- Athukorala J. in *Amal Sudath Silva v. Kodituwakku, Inspector of Police and Others* (1987) 2 Sri L. R. 119¹⁰

Therefore in the light of IP the most appropriate recommendation would be to advise all non-trained medical officers to refer torture victims to the nearest medico-legal unit for detailed examination by a trained forensic expert. As most parts of the country are now covered by consultant judicial medical officers this would be a wise request for the College of Forensic Pathologists to adopt soon. The other alternative is to provide comprehensive training on basic principles of examination and documentation of findings on torture victims to non-expert medical officers in peripheries which is already underway as a part of IPIP. A more practical approach would be to upgrade selected major medico-legal units to adopt IP in full capacity with adequate trained staff and other infrastructure modifications including a regular progress review mechanism.

6. Istanbul Protocol implementation project

Although the IP has received UN endorsement in year 2000 not much interest was observed from UN member countries to adopt IP at local level as the discussions on IP was mostly confined to the professional circles. Hence there was a major need to internalise the IP into local context of countries at least which were regarded with high prevalence of Torture. The International Rehabilitation Council for Torture victims (IRCT) has launched its Istanbul Protocol Implementation Project (IPIP) in 2004 in 5 target countries including Sri Lanka. The countries included in this project have recorded different observations with regard to implementation of the IP. According to the Mexican experience the government adopted the IP without much objection but with hidden intentions. "In August 2003 the Mexican government proudly announced that the General Prosecutors Office had become the first institution worldwide to put the Istanbul Protocol into daily practice. The institution had developed an adaptation of the medical-psychological exam, on non-forgable, numerated paper with watermarks. This exam is to be realized by the institutions' forensic experts whenever a person claims a charge for torture or the lawyer or human rights commission requests such exam."¹¹ However the subsequent experience showed that the Mexican people have not benefited by implementation of IP. "Nevertheless there is a risk that the Istanbul Protocol is used to cover up torture, to discredit the victims, to rehabilitate the perpetrators and guarantee their impunity. Finally to consolidate the status quo, but protect and shield authorities from national and international criticism. Mexican authorities have done so by stripping the IP from its legal context, isolating the medical exam and forget about the basic principles for a prompt and efficient investigation of torture as defined in the IP: independence of the investigators from the presumed authors and institutions to which they belong; competence and impartiality, as well as the maximum level of professionalism and in case of the medical professions the respect of the highest standards of ethics."¹¹

Though Sri Lanka is far behind Mexico in terms of official recognition of IP, the lessons learnt by Mexicans is more important for Sri Lankan professional bodies to oversee their action plans and professional responsibilities. The discussions on IP over the last few years in Sri Lanka has brought forth some important elements persisted in our present medico-legal documentation system. One aspect is the less significance given to the psychological examination of victims. The Judicial Medical Officers (JMOO) who submitted most of the medico-legal reports over the past twenty years to the supreme courts have mainly concentrated on physical findings of the victim to draw conclusions which are only half reports according to standards of the IP. However many recent studies have shown that Sri Lankan torture victims have undergone sequelae of psychological torture.^{2,12} Hence the psychological examination findings of torture victims can no longer ignored in our medico-legal reports. Unfortunately the JMOO

are not considered as experts by Sri Lankan courts to provide evidence on psychological torture. The major obstacle faced by forensic experts in this respect is the difficulty of obtaining psychiatric or psychologist opinion on torture victims within a short period due to paucity of psychiatrists and psychologists in Sri Lanka. The psychiatric and psychologist referrals are currently available only in the major teaching and some general hospitals in Sri Lanka. Therefore it is required to train all consultant judicial medical officers to perform at least a mini mental state and psychological examination and record findings in their reports as a short-term remedy.

It is also important to analyse more deeply the specific aspects of documentation recommended by the IP in the context of Sri Lankan situation. As mentioned by Mandel & Worm, "In practice, a wide range of factors affects medico-legal documentation. The aim of the investigation for one (i.e. gathering evidence for a trial or screening large prison populations) largely determines the process since the level of detail and resources per victim varies accordingly. One of the main differences between the medical documentation and the rehabilitative examination is the need to record injuries and traces of injuries even if they cannot be treated. Scars, for instance, can be highly indicative of torture and should always be recorded, preferably photographed, when performing medical documentation. Scars are, however, largely irrelevant for the rehabilitative process, since they are already healed and only rarely affect the present health status of the victim."⁵ In Sri Lankan situation the torture victims are mostly examined for breach of fundamental rights violation or as a part of criminal investigation for court purposes and detailed description of injuries including scars must be included in all reports. The tendency of late presentation is frequently seen among torture victims due to various underlying reasons and hence the examination of scars obviously comprises an important part of the report. The significance of observing and accurate reporting of scars on torture victims was highlighted in a recent report.¹³ The IP is more suited for such medical documentation of findings on torture victims. There is no provision in the currently using medico-legal documentation formats to describe scars of torture victims in detail. However it is important to remember that main focus of IP is forensic documentation though it recommends that rehabilitation should be available to survivors of torture.

7. Future of implementing Istanbul Protocol in Sri Lanka

The Sri Lankan government has not yet made any public statement expressing its commitment to implementing the Istanbul Protocol. "However, at a Joint Meeting of the Human Rights Commission and the Police Commission, on 22 May 2004, both the Chairperson of the Human Rights Commission and the Chairman of the Police Commission condemned torture and stated that they would work to drastically reduce the number of torture cases. According to the Government "the Inter-Ministerial Working Group on Human Rights worked closely with all investigative mechanisms such as the Disappearance Investigations Unit (DIU), the Criminal Investigations Department (CID) and the Special Investigation Unit (SIU) in order to bring cases to a speedy conclusion. Torture cases would be a high priority under the National Human Rights Commission's strategic plan for 2003–2006, which also envisaged consultation with government authorities and NGOs."¹⁴

However the effective implementation of IP in Sri Lanka cannot be achieved only with the participation of professional bodies. There was considerable attention and cooperation from the medical and legal professions towards the adoption of IP during last 4 years. The first IPIP training seminar held in December 2004 was attended by 42 forensic practitioners and non-expert medical officers and 24 lawyers. The subsequent training of trainers' session

held in June 2007 was attended by 15 forensic experts and 10 lawyers. The requirement of performing thorough psychological examination of torture victims was insisted during these sessions and a subsequent training session was held to train all JMOO in psychological examination of torture victims if they are not in a position to get expert psychological evidence.

The creation of a genuine political will amongst the government hierarchy to incorporate the IP & its contents to the judicial procedures of Sri Lanka would be a strenuous battle for all professional bodies concerned. However the implementation of IP should be done with many other parallel applications in the legal, police and witness protection systems. The IP is mainly concerned with accurate and detailed medico-legal documentation of torture. Unless and until such medico-legal reports of torture are appropriately corroborated in courts the justice cannot be obtained for the aggrieved party. Therefore the positive effects brought forth by the IP would be nullified in the public eye if there is not a parallel process of legal documentation of torture in existence. This is a major untold grievance currently observed in Sri Lanka. Gerard Perera, a torture victim who suffered severely at the hands of police due to mistaken identity was examined thoroughly and effective medico-legal reports were submitted to the courts after the initial incidents in 2002. The accused police officers were held liable for torture by the Supreme Courts of Sri Lanka but the torture victim was assassinated two years later before he testified in the High Court criminal case against the same police officers. Though it was revealed that accused police officers had conspired to assassinate the torture victim, all of them were acquitted in a strange subsequent hearing. A similar incident occurred in September 2008.

In our opinion the implementation of IP should pass through the phase of incorporation into local policy in any country subsequent to an initial phase of awareness and acceptance amongst professional bodies. The Sri Lankan situation has just reached the first phase and whether next phase will be a plateau or a downward slope is yet to be seen. However the implementation and continuous application of IP is only one step towards reaching a torture

free society in the long run. If the commitment of political hierarchy, administration, police and judiciary are not streamed parallel with it the net result would definitely be a much downgraded situation than at present.

Conflicts of interest

None declared.

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